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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RONALD RICHMAN,

Plaintiff,

v.

UNITED STATES,

Defendant.

No. C 07-5317 WHA

NOTICE OF MOTION AND MOTION TO
DISMISS FOR LACK OF SUBJECT
MATTER JURISDICTION
[FED. R. CIV. P. 12(b)]

Date: August 7, 2008
Time : 8:00 a.m.
Place: Ctrm 9, 19th Fl.
Before: Hon. William H. Alsup

NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on August 7, 2008, at 8:00 p.m., or as soon thereafter as may be heard, Defendant United States, through its attorney of record, will request the Honorable William H. Alsup, in Courtroom No. 9, 19th Floor at 450 Golden Gate Avenue in San Francisco, California, pursuant to Federal Rules of Civil Procedures 12(b), to dismiss the complaint and action in the above-captioned matter. This motion will be made on the ground that this Court lacks subject matter jurisdiction over the complaint because plaintiff has not exhausted his administrative remedies.

1 This motion is based upon all the papers and records currently on file in the above-
2 captioned matter and any additional evidence and argument that this court may permit.
3

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 This action, filed pursuant to the Federal Tort Claims Act ("FTCA"), should be dismissed
6 because plaintiff's employer filed a timely and sufficient administrative tort claim, but plaintiff
7 did not.
8

9 The timely receipt by an agency of an administrative tort claim for a sum certain is a
10 jurisdictional prerequisite to an FTCA case. Here, plaintiff has no proof that an administrative
11 tort claim was received by the United States Department of Agriculture within the two-year
12 limitation period. Plaintiffs alleges the accident in this case occurred October 24, 2005.
13 Plaintiff's employer submitted a timely administrative claim on or about October 16, 2007, but
14 plaintiff did not. Accordingly, plaintiff's claim must be dismissed for lack of subject matter
15 jurisdiction.

16 **I. FACTS**

17 On October 24, 2005, Plaintiff Ronald Richman was an employee of the County of
18 Contra Costa. Complaint at ¶ 5. He was driving a truck within the course and scope of his
19 employment when he was involved in an accident. Complaint at ¶ 6. Specifically, Peter Lacy, an
20 employee of the United States Department of Agriculture, was driving another vehicle that
21 collided with the one being driven by plaintiff. Complaint at ¶ 6.

22 On or about October 16, 2007, plaintiff's employer filed an administrative claim for
23 damage, injury or death ("SF 95") with the United States Department of Agriculture. See
24 Docket No. 18, Exh. A. There is no record, however, that plaintiff submitted any such claim to
25 the Department of Agriculture on or before October 24, 2007; instead, on October 18, 2007,
26 plaintiff filed the pending lawsuit seeking general damages in the amount of \$250,000, and other
27 relief.

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II. ANALYSIS

1. Each plaintiff must demonstrate that he/it submitted a timely administrative complaint.

The sovereign cannot be sued without its consent. *United States v. Sherwood*, 312 U.S. 584 (1941); *Gould v. U.S. Dept. of Health & Human Services*, 905 F.2d 738, 741 (4th Cir. 1990). Moreover, the terms of that consent define a federal court's jurisdiction to entertain such suit. *United States v. Testan*, 424 U.S. 392 (1976). The FTCA is the exclusive waiver of sovereign immunity for actions sounding in tort against the United States, its agencies and/or employees acting within the scope of their employment. *Smith v. United States*, 507 U.S. 197 (1993) citing 28 U.S.C. §1346(b). All limits and conditions within the FTCA are to be strictly construed in favor of the sovereign. *McNeil v. United States*, 508 U.S. 106, 124 L.Ed. 2d 21, 113 S.Ct. 1980 (1983); *Orleans*, 425 U.S. at 807; *Thigpen v. United States*, 800 F.2d 393 (4th Cir. 1986). "It is to be presumed that a cause lies outside [the federal court's] limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

A key prerequisite to filing suit under the FTCA involves the presentation of an administrative claim to the government within two years of the incident. 28 U.S.C. §2401 (b) provides:

(b) a tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

The requirement of filing an administrative claim is jurisdictional and cannot be waived. *Blain v. United States*, 552 F.2d 289, 291 (9th Cir. 1977) (per curiam). The jurisdictional minimum requirement for a tort claim includes a written statement sufficiently describing the injury to enable the agency to begin its own investigation, and a sum certain damages claim. *Burns v. United States*, 764 F.2d 722 (9th Cir. 1985). Failure to comply with the sum certain requirement results in the case being treated "as if no administrative claim had ever been filed." *Id.*; see also *Caton v. United States*, 495 F.2d 635, 637-38 (9th Cir. 1974). Additionally, the party submitting the claim must sign the administrative complaint. See *Blain*, 552 F.2d at 291.

In ruling on a challenge to subject matter jurisdiction, the district court is ordinarily free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *See Thornhill Publishing Co. v. General Telephone Corp.*, 594 F.2d 730, 733 (9th Cir.1979). In such circumstances, "[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill*, 594 F.2d at 733. The burden of persuasion lies with the plaintiff in an FTCA case. *Muth v. United States*, 1 F.3d 246, 249 (4th Cir. 1993).

2. This court lacks jurisdiction over Richman's district court case because he failed to submit a timely administrative tort claim.

The incident upon which Richman bases his claim occurred October 24, 2005. Complaint, ¶¶ 5, 6. Accordingly, this court may not exercise jurisdiction over plaintiff's claim unless he can demonstrate the USPS received from him an administrative tort claim on or before October 24, 2007. *See* 28 U.S.C. §2401 (b).

Plaintiff has taken the unusual step of filing his initial disclosures. *See* Docket No. 8. The documents confirm that plaintiff is not relying on any document delivered by him and signed by him with a sum certain and claiming damages as a result of the October 24, 2005 accident. *See* Docket No. 8. Because Richman did not deliver to the Department of Agriculture an administrative complaint within the two-year time limitation, his district court complaint must be dismissed. *See* 28 U.S.C. §2401 (b); *Blain*, 552 F.2d at 291.

III. CONCLUSION

This Court should dismiss the complaint in this case for lack of subject matter jurisdiction because the Department of Agriculture did not receive an administrative tort claim from plaintiff in this matter on or before October 24, 2007.

Respectfully submitted,

JOSEPH P. RUSSONIELLO
United States Attorney

Dated: June 27, 2008

/s/
ABRAHAM A. SIMMONS
Assistant United States Attorney